

Willamette Mercury Multiple Discharger Variance Advisory Committee Meeting #6 – Supplementary Materials



State of Oregon
Department of
Environmental
Quality

DEQ received a number of comments provided by members of the Willamette Basin Mercury Multiple Discharger Variance Advisory Committee on draft rule revisions provided at the 5th Advisory Committee meeting on June 29, 2019. DEQ has made rule revisions in response to some comments. Other comments did not result in rule revisions. Per request by the Advisory Committee, DEQ is providing this document to explain why certain comments did not result in rule revisions.

Variance Authorization Rule

1. OAR 340-041-0069(1)(b)(B), prohibiting variances if they would jeopardize ESA species, should require DEQ to make a finding.

DEQ proposes removing this requirement, as it is not required by Federal rules and EPA approval of any variance addressing aquatic life criteria would require ESA consultation with the Services.

2. Proposed language to OAR 340-041-0059(3)(a) – “The requirements that apply throughout the term of the water quality variance will not result in any lowering of the currently attained ambient water quality.” Comment that there should be a provision that requires subsequent monitoring.

DEQ included this provision to be consistent with federal rules. These dischargers will be required to monitor effluent mercury levels to ensure that limits are being met. These limits will be reviewed every five years and will never get less stringent. Therefore, if these requirements are met, and are being improved upon over time, these levels will not result in any lowering of ambient water quality. DEQ will continue to assess ambient water quality.

3. DEQ should not remove language stating that “No existing use will be impaired or removed as a result of granting the variance.”

DEQ replaced this language to be consistent with federal variance rule language stating, “The requirements that apply throughout the term of the water quality variance will not result in any lowering of the currently attained ambient water quality.” If there is no lowering of current water quality, but rather improving quality, which is a requirement of the variance, granting the variance does not result in the impairment or removal of

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existing uses. In addition, DEQ ensures that existing uses are protected through implementation of its antidegradation policy.

4. Why has DEQ removed the concept of giving priority to NPDES permit renewals for permits containing variances, given DEQ's history of administratively continuing permits?

There are many reasons why DEQ would prioritize one permit over another. For example, there may be more environmental benefit to prioritizing issuing a permit that would require a technology upgrade. As a result, DEQ prefers to utilize its own discretion to prioritize permit renewals based on a variety of considerations, rather than one particular circumstance.

5. Why would DEQ not include the effective date of the variance in an order or rule?

DEQ removed this requirement, because any variance is subject to EPA approval and the effective date is therefore unknown at the time DEQ prepares a variance order or rule.

6. Commenter asked why the requirement to develop a pollutant minimization plan contains no reference to a permittee's being required to address indirect dischargers (e.g., pretreaters) to its collection system as a reasonable way of not polluting public waters and making reasonable progress?

PMPs should be tailored to address the circumstances of each facility. Instead, specific requirements for minimization plans should be incorporated into the individual variance or in applicable guidance. In DEQ's Internal Management Directive on Implementation of the Methylmercury Criterion in NPDES Permits, DEQ notes that a pretreatment program may serve as a principal element of an MMP and that mercury-related information collected from a pretreatment program should be included in an MMP.

7. DEQ needs to define what "reasonable progress toward attaining the water quality standard(s)" means.

The provisions outlining the requirements for each expression of highest attainable condition establish the basis for permit requirements for any facility under a variance, and these requirements are intended to lead to progress toward attaining the water quality standard. If DEQ finds that such conditions do not lead to progress, DEQ will incorporate additional requirements after re-evaluating the Highest Attainable Condition for any variance lasting longer than five years.

8. Comment that DEQ should not conduct public notification about changing water quality standards through the NPDES permit process.

DEQ addressed this comment since the advisory committee meeting on August 1, 2019.

Comments considered but did not result in changes to proposed rules – Willamette Basin Mercury MDV Rule

1. Comments regarding the type of variance and including nonpoint BMPs that can be used to make progress towards achieving the underlying criteria.

DEQ is adopting a multiple discharger variance for mercury that applies to eligible NDPES dischargers within the Willamette Basin. DEQ is not adopting a waterbody variance. Federal rules do not require dischargers to identify cost-effective and reasonable nonpoint source controls for discharger-specific variances. However, they may do so at their discretion. DEQ is addressing nonpoint sources through implementation of the Willamette Mercury TMDL.

2. The duration of the variance should be 10 years.

DEQ expects that, through implementation of the MDV and the TMDL, it will take more than 20 years to attain the methylmercury human health criterion. Moreover, DEQ expects that it will take 20 years to determine whether the actions have resulted in progress toward the water quality standard and achievement of the highest attainable condition. As a result, DEQ has concluded that 20 years is a reasonable term for the variance, after which, DEQ will determine the best path forward to address mercury.

Through the required 5-year re-evaluation of the Highest Attainable Condition, DEQ will evaluate the progress made under the variance, and will determine what further actions, if any, point sources can do to make additional progress toward the water quality standard. In addition, at each individual permit renewal, the permit limit for the individual discharger will be recalculated based on the most recent data. MMPs will be updated if needed. Both the 5-year re-evaluations and the draft renewed permits, including their MMPs, undergo public comment. This re-evaluation and permit renewal process provides for a transparent process and continued incremental progress during the 20 year term of the variance.

3. DEQ should review the efficacy and cost-efficiency of nonpoint BMPs at the five, ten, fifteen year marks.

As noted, the updated Willamette Basin TMDL addresses control of nonpoint sources of mercury. The five-year review of this TMDL is the appropriate mechanism to review the efficacy of nonpoint BMPs. The variance applies only to permitted point sources.

4. A number of other comments from EPA and NWEA requested additional information supporting assertions made in the MDV rule, particularly under the “Findings” section.

DEQ provides support for its assertions in the Variance document that supports the rule, rather than in the rule itself.

5. What happens if the variance expires and the permit based on the variance becomes administratively extended?

As with any other permit, permit conditions based on the variance remain in effect until the permit is renewed.